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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

SYLVIA OCHOA, Individually and as Personal Representative, etc., et al. Plaintiffs and Appellants, v. SETTON PISTACHIO OF TERRA BELLA, INC., et al. Defendants and Respondents.	F073844 (Super. Ct. No. VCU255716) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Melinda Myrle Reed, Judge.

The McMillan Law Firm, Scott A. McMillan, Marilyn S. Phelps, and Lauren Hanley-Brady for Plaintiffs and Appellants.

Raimondo & Associates, Anthony Raimondo and Michael A. Buda for Defendants and Respondents Setton Pistachio of Terra Bella, Inc., Setton Equities, LLC, Setton Farms, Inc., Setton Realty Co., Inc., Setton Realty, LLC, and Terra Bella Agland, LLC.

Wanger Jones Helsley, Scott D. Laird and Jay A. Christofferson for Defendant and Respondent Dole Food Company.

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Plaintiffs Sylvia Ochoa and Angie Ruiz appeal from the Tulare County Superior Court's March 15, 2016 judgment entered on an order granting summary judgment in favor of defendant Dole Food Company (Dole). Plaintiffs also appeal from the court's June 14, 2016 order denying a motion for new trial. For the reasons set forth below, we affirm both the judgment and order.

FACTUAL AND PROCEDURAL HISTORY

Decedent Fernando Santiesteban, Ochoa's husband, was employed by Setton Pistachio of Terra Bella, Inc. (Setton Pistachio), as a maintenance worker. On February 11, 2011, at Setton Pistachio's processing facility in Terra Bella, California, Santiesteban was charged with servicing a 120-foot "east-west wet auger,"[1] namely extricating the helical screw from the subterranean metal trough in preparation for a replacement unit. However, while he was in the middle of performing this task, a coworker activated the screw. Santiesteban was fatally wounded as a result.

Previously, in 1987, Dole's predecessor Castle & Cooke, Inc.,[2] acquired the Terra Bella facility after purchasing from Apache Corporation the shares of S&J Ranch, Inc. (S&J), and S&J's wholly owned subsidiary T.M. Duche Nut Co., Inc. The purchase agreement dated September 29, 1987, specified a closing date of "no[] later than December 15, 1987." On July 13, 1995, Dole Dried Fruit and Nut Company,[3] Dole's

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1 On appeal, plaintiffs suggest the east-west wet auger should be identified as a "power press." Whether a machine constitutes a power press is not germane to the instant appeal, which does not concern the exclusive remedy provisions of the workers' compensation statute (Lab. Code, §§ 3601, 3602, 5300) or the power press exception thereto (*id.*, § 4558). In any event, in *Ochoa v. Setton Pistachio of Terra Bella, Inc.* (Apr. 16, 2019, F073978) (nonpub. opn.) (see fn. 4, *post*), which does involve the aforementioned provisions with respect to plaintiffs' wrongful death action against Setton Pistachio, we concluded the east-west wet auger did not constitute a power press as a matter of law.

2 Castle & Cooke, Inc., became Dole in 1991.

3 T.M. Duche Nut Co., Inc., became Dole Nut Company in 1988.

wholly owned subsidiary, sold the Terra Bella facility to Setton Properties, Inc. Setton Pistachio was the guarantor.

On February 11, 2013, Ochoa brought a wrongful death action against Setton Pistachio.[4]

On March 14, 2013, plaintiffs' counsel deposed Paul Gonzales, a Setton Pistachio employee who formerly worked for Dole at the Terra Bella facility. The following exchange transpired:

> "Q. Are there any sort of graphics, any sort of pictographs, stickers, or anything else that have been put on the control equipment, on the power equipment, to identify what to shut off for the auger?
>
> "A. No. The company, when you buy an auger from a company, . . . they have those stickers placed on the auger themselves, on the sides.
>
> "Q. Okay.
>
> "A. But since the water – these are wet augers. The north and south is ground level. The east and west is three feet down in the ground.
>
> "Q. Okay.
>
> "A. So you don't see them. But all top level – all above augers are – have stickers on them stating that they can cut you.
>
> "Q. Do you know when that – the east-west auger was – is that the same auger that was there when you were working there?
>
> "A. Yes.
>
> "Q. So . . . it goes way back?
>
> "A. Yes.

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4 The superior court granted a motion for summary judgment in favor of Setton Pistachio and Terra Bella Agland, LLC (Terra Bella Agland). In *Ochoa v. Setton Pistachio of Terra Bella, Inc.*, *supra*, F073978, plaintiffs appealed from a June 14, 2016 judgment entered on the order granting summary judgment as well as a June 14, 2016 order denying, in part, a motion to tax costs awarded to Dole.

"Q. Do you know if it was modified from . . . the way it was purchased originally?

"A. . . . [¶] . . . [¶] . . . No, it was never modified. [¶] . . . [¶]

"Q. When . . . they were pulling the pieces of the auger out, did it look like there was still stickers on –

"A. Oh, no.

"Q. The stickers are gone?

"A. The stickers are on the outside. What they were pulling out was just the auger itself.

"Q. Okay. So the box that the auger is in –

"A. Is in concrete.

"Q. – is in concrete, and the stickers are now encased in concrete."

In an amended complaint filed March 5, 2015, Ochoa and Ruiz, the guardian ad litem of Santiesteban and Ochoa's children, added Dole as a defendant. After Dole's demurrer was overruled in part and sustained in part, plaintiffs filed a second amended complaint on July 8, 2015. They alleged Dole was strictly liable for the east-west wet auger's manufacturing, design, and/or warning defects; negligently manufactured, designed, sold, leased, supplied, furnished, and/or failed to provide warnings about the east-west wet auger; and either negligently owned, possessed, and/or controlled the Terra Bella facility and allowed a dangerous condition on the property or actively concealed or otherwise failed to disclose said condition to a vendee.

On September 22, 2015, plaintiffs' counsel deposed Jeff Gibbons, Setton Pistachio's plant manager who formerly worked for Dole at the Terra Bella facility. The following exchange transpired:

"Q. Have you seen warning labels on any of the helical screws or the motors that drive [the north-south and east-west screws]?

"A. Yes.

"Q. Where are those warning labels located?

"A. They would be on the equipment.

"Q. The east-west screw, did it have a warning label?

"A. It didn't on the auger itself, because the auger is buried in the ground, and I don't know what warning label or what was at this motor.

"Q. What warning label was visible from where Mr. Santiesteban was killed?

"A. I don't think there was a warning label visible from that point."

On or around October 23, 2015, Dole moved for summary judgment. It contended:

"[T]he undisputed facts demonstrate that Dole . . . is entitled to judgment as a matter of law . . . . [¶] . . . [¶]

". . . [T]he undisputed evidence demonstrates that Dole . . . did not manufacture, design or otherwise produce the east-west auger (the 'Wet Auger') that was allegedly involved in . . . Santiesteban's accident. Dole . . . likewise is not and never has been in the business of manufacturing, designing, selling, distributing, or retailing the Wet Auger or wet augers generally.

". . . [T]he undisputed evidence demonstrates that Dole . . . has not had ownership, possession, or control over the Wet Auger or the Terra Bella facility where the Wet Auger is located . . . since Setton [Properties, Inc.,] acquired the property in 1995. . . . Dole . . . likewise did not conceal or fail to disclose the Wet Auger to Setton [Pistachio] because Setton [Pistachio] had knowledge of the location and existence of the Wet Auger at the time of the 1995 sale."

In support of its motion, Dole submitted several declarations. Gibbons's declaration, executed on October 22, 2015, read:

"1. I am the Plant Manager at Setton Pistachio . . . , located in the City of Terra Bella, County of Tulare. I have held the same position at Setton [Pistachio] since 1995. Furthermore, I worked at the same facility for Dole . . . prior to 1995. Unless qualified, I have personal knowledge of

the matters stated hereafter and, if called as a witness, could and would testify competently to the same.

"2. I was employed by Setton [Pistachio] as Plant Manager when . . . Santiesteban . . . was killed in an accident by a machine referred to as the east-west wet auger (the 'Wet Auger') at Setton[Pistachio]'s Terra Bella pistachio processing facility on February 11, 2011. Mr. Santiesteban was in the process of removing and dismantling the Wet Auger when the accident occurred.

"3. I have personal knowledge of the functions, purpose and background of all the machinery and equipment at Setton[Pistachio]'s Terra Bella facility, including the Wet Auger.

"4. The trough that housed the Wet Auger in Setton[Pistachio]'s Terra Bella . . . facility was already installed when Setton [Properties, Inc.,] purchased the facility in 1995. I was aware of the existence and location of the Wet Auger when Setton [Pistachio] purchased the facility in 1995.

"5. Several former employees of Dole . . . who were intimately involved with maintaining equipment in the Terra Bella facility, including the Wet Auger, continued to work at the Terra Bella facility after the 1995 sale, but as employees of Setton [Pistachio]. These persons include, but are not limited to myself, Carlos Serrano, and Paul Gonzales, all of whom had knowledge of the location and existence of the Wet Auger.

"6. The Wet Auger was a conveyor that transported wastewater, hull waste, and other debris to a waste pond for composting and recycling. . . .

"7. The Wet Auger used a large, rotating helical screw to move debris along underground trenches covered by steel plates. . . . [¶] . . . [¶]

"10. After Setton [Properties, Inc.,] purchased the Terra Bella facility from Dole . . . in 1995, Dole . . . did not own, lease, rent, maintain, manage, supervise, operate, possess and/or otherwise have control over the [f]acility, including the Wet Auger, where the incident occurred February 11, 2011.

"11. After Setton [Pistachio] purchased the Terra Bella facility from Dole . . . in 1995, no agent, representative or employee of Dole . . . inspected, tested, operated, maintained, possessed and/or otherwise had control over the Wet Auger, where the incident occurred February 11, 2011. [¶] . . . [¶]

"13. After Setton [Properties, Inc.,] purchased the Terra Bella facility from Dole . . . in 1995, Dole . . . [, its] agents, officers, and representatives did not employ any person that worked in the Terra Bella facility, including . . . Santiesteban.

"14. After Setton [Properties, Inc.,] purchased the Terra Bella facility from Dole . . . in 1995, Dole . . . , its agents, officers, and representatives, did not have the ability to inspect or test the Wet Auger.

"15. After Setton [Properties, Inc.,] purchased the Terra Bella facility from Dole . . . in 1995, [Dole's] agents, officers, and representatives, did not have the ability to warn Setton[Pistachio]'s employees or other persons entering the Terra Bella facility about the Wet Auger. [¶] . . . [¶]

"I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct . . . ."

The declaration of Richard Jacobs, executed on October 22, 2015, read:

"1. I am the Senior Counsel at Dole Fresh Vegetables, Inc. ('DFV'), a subsidiary of . . . Dole . . . . In such position, I am responsible for providing legal advice to DFV, and to Dole . . . with regard to matters involving DFV, with regard to corporate, commercial, employment/labor, general litigation and related matters. Unless qualified, I have personal knowledge of the matters stated hereafter and, if called as a witness, could and would testify competently to the same.

"2. Dole . . . is one of the world's largest producers of bananas and pineapples, an industry leader in other tropical fruits, deciduous fruit principally from Chile and South Africa, packaged salads, fresh-packed vegetables and fresh berries.

"3. Castle & Cooke, Inc., a predecessor to Dole . . . , acquired the Terra Bella . . . pistachio processing facility and its contents . . . as part of its acquisition of the shares of a group of entities including T.M. Duche Nut Co., Inc. ('Duche') on or about October 20, 1987, from Apache Corporation. The wet auger in the east-west auger trough that . . . killed . . . Santiesteban (the 'Wet Auger') was acquired for the sole purpose of using it in the [f]acility and in the business of Duche, renamed as 'Dole Nut Company' in 1988.

"4. Dole . . . engaged in a one-time sale of the Wet Auger when it sold the [Terra Bella] [f]acility to Setton Properties, Inc.[,] . . . on July 13, 1995. Dole . . . sold the [f]acility to Setton [Properties, Inc.,] through its

then wholly-owned subsidiary, Dole Dried Fruit and Nut Company. . . . [¶] . . . [¶]

"6. Dole . . . has not sold a wet auger like the one that . . . killed . . . Santiesteban before or since the 1995 transaction with Setton [Properties, Inc.]. Dole . . . , its agents, officers, and representatives, are not in the business of manufacturing, retailing, or distributing wet augers of the kind that . . . killed . . . Santiesteban on February 11, 2011.

"7. After the 1995 sale to Setton [Properties, Inc.], Dole . . . , its agents, officers, and representatives, did not own, lease, rent, maintain, manage, supervise, operate, possess and/or otherwise have control over the [Terra Bella] [f]acility, including the Wet Auger, where the incident occurred February 11, 2011, nor did Dole . . . engage in any further operations in the pistachio growing and processing operations previously engaged in by Duche.

"8. After the 1995 sale to Setton [Properties, Inc.], no agent, representative or employee of Dole . . . inspected, tested, operated, maintained, possessed, [o]wned, and/or otherwise had control over the Wet Auger.

"9. After the sale, Dole . . . did not have the ability to inspect or test the Wet Auger, nor did Dole . . . have the ability to warn Setton [Pistachio]'s employees or other persons entering the [Terra Bella] [f]acility about the Wet Auger.

"10. Dole . . . , its agents, officers, and representatives, did not design or manufacture the Wet Auger that caused the death of . . . Santiesteban in this action.

"11. Dole . . . , its agents, officers, and representatives, are unaware of the identity of the manufacturer and/or designer of the Wet Auger.

"12. Dole . . . did not employ any person that worked in the [Terra Bella] [f]acility after the 1995 sale to Setton [Properties, Inc.], including . . . Santiesteban.

"13. Dole . . . did not conceal or fail to disclose the existence or location of the Wet Auger from Setton [Properties, Inc.,] when Dole . . . sold the [f]acility and Wet Auger to Setton [Properties, Inc.,] in 1995. In fact, several former employees of Dole . . . who were involved with maintaining equipment in the [Terra Bella] [f]acility, including the Wet

Auger, continued to work at the [f]acility after the 1995 sale, but as employees of Setton [Pistachio]. These persons included, but are not limited to, Jeff [¶] Gibbons, Carlos Serrano, and Paul Gonzales, all of whom had knowledge of the location and existence of the Wet Auger.

"I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct . . . ."

The declaration of Lee Cohen's declaration, executed on October 23, 2015, read:

"1. I am the General Manager at Setton Pistachio . . . , located in the City of Terra Bella, County of Tulare. I have held the same position at Setton [Pistachio] for approximately five years. Unless qualified, I have personal knowledge of the matters stated hereafter and, if called as a witness, could and would testify competently to the same.

"2. My duties as the General Manager include the managerial, operational, financial, logistical, administrative and technical activities of Setton [Pistachio] at the Terra Bella facility.

"3. I was employed by Setton [Pistachio] as the General Manager when . . . Santiesteban . . . died in an accident while working on a machine referred to as the east-west [wet] auger (the 'Wet Auger') at Setton[Pistachio]'s Terra Bella facility on February 11, 2011. Mr. Santiesteban was in the process of removing and dismantling the Wet Auger when the accident occurred.

"4. I have knowledge of the functions, purpose and background history of all of the machinery and equipment at Setton[Pistachio]'s Terra Bella facility, including the Wet Auger. I have access to all of Setton[Pistachio]'s business records, and am familiar with the history of [the] facility.

"5. The trough that housed the Wet Auger in Setton[Pistachio]'s Terra Bella . . . facility was already installed when Setton [Properties, Inc.,] purchased the facility from Dole . . . in 1995. I was aware of the existence and location of the Wet Auger when Setton [Pistachio] purchased the facility in 1995.

"6. The Wet Auger was a conveyor that transported wastewater, hull waste, and other debris to a waste pond for composting and recycling. . . .

"7. The Wet Auger used a large, rotating helical screw to move debris along underground trenches covered by steel plates. . . . [¶] . . . [¶]

"10. After Setton [Properties, Inc.,] purchased the Terra Bella facility from Dole . . . in 1995, Dole . . . did not own, lease, rent, maintain, manage, supervise, operate, possess and/or otherwise have control over the [f]acility, including the Wet Auger, where the incident occurred February 11, 2011.

"11. After Setton [Properties, Inc.,] purchased the Terra Bella facility from Dole . . . in 1995, no agent, representative or employee of Dole . . . inspected, tested, operated, maintained, possessed and/or otherwise had control over the Wet Auger, where the incident occurred February 11, 2011. [¶] . . . [¶]

"13. After Setton [Properties, Inc.,] purchased the Terra Bella facility from Dole . . . in 1995, [Dole's] agents, officers, and representatives did not employ any person that worked in the Terra Bella facility, including . . . Santiesteban.

"14. After Setton [Properties, Inc.,] purchased the Terra Bella facility from Dole . . . in 1995, Dole . . . , its agents, officers, and representatives, did not have the ability to inspect or test the Wet Auger.

"15. After Setton [Properties, Inc.,] purchased the Terra Bella facility from Dole . . . in 1995, Dole[']s] . . . agents, officers, and representatives, did not have the ability to warn Setton[Pistachio]'s employees or other persons entering the Terra Bella facility about the Wet Auger.

"I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct . . . ."

The declaration of Stewart Fellner, executed in October 2015, read:

"1. I am the Chief Financial Officer . . . at Setton Pistachio . . . , located in the City of Terra Bella, County of Tulare. Unless qualified, I have personal knowledge of the matters stated hereafter and, if called as a witness, could and would testify competently to the same.

"2. My duties . . . include the administrative, financial, and risk management operations of the company, the development of a financial and operational strategy, metrics tied to that strategy, and the ongoing development and monitoring of control systems designed to preserve company assets and report accurate financial results. I work in the management of a business enterprise that is comprised of a number of different, but related, legal entities.

"3. I was employed by Setton [Pistachio] as the [Chief Financial Officer] when . . . Santiesteban . . . died in an accident while working on a machine referred to as the east-west [wet] auger (the 'Wet Auger') at Setton[Pistachio]'s Terra Bella facility on February 11, 2011.

"4. Setton [Pistachio] purchased the Terra Bella . . . facility from Dole Dried Fruit and Nut Company, a then wholly-owned subsidiary of Dole . . . , on July 13, 1995. . . .[5]

"5. In my capacity as Chief Financial Officer for Setton [Pistachio], I am also the custodian of records . . . . The July 13, 1995 Acquisition Agreement was created in the regular course of business at or near the time of its execution. I am familiar with Setton[Pistachio]'s financial documents and acquisitions and can attest that the July 13, 1995 Acquisition Agreement was produced from Setton[Pistachio]'s files in this matter and is a true and correct copy of the original in Setton[Pistachio]'s files.

"6. Since Setton [Pistachio] purchased the Terra Bella . . . facility, Dole . . . has not had any ownership or possessory interest in the land where Setton[Pistachio]'s Terra Bella . . . processing plant is located, and Dole . . . has also never had any control or authority over any possessor related duties related to the Terra Bella . . . facility, including, but not limited to, the acquisition of equipment and machinery; the inspection, maintenance, and repair of the property; controlling access to the [f]acility; and the active monitoring of compliance with building and safety codes.

"I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct . . . ."[6]

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5 Fellner attached a copy of the July 13, 1995, acquisition agreement.

6 On appeal, plaintiffs complain Dole's summary judgment motion "did not fairly identify the issues." We disagree. Plaintiffs alleged strict and negligence-based products liability for manufacturing, design, and/or warning defects and premises liability. Dole's motion addressed each of these claims.

Plaintiffs also complain the assertion Dole engaged in a " 'one-time sale' " of the east-west wet auger should have been raised as an affirmative defense. "[I]t is incumbent upon an appellant to present argument and authority on each point made." (*County of Sacramento v. Lackner* (1979) 97 Cal.App.3d 576, 591.) "If he does not, he may, in the court's discretion, be deemed to have abandoned his [argument]." (*In re Sade C.* (1996) 13 Cal.4th 952, 994.) Here, plaintiffs fail to provide legal authority for their contention. Thus, we decline to address it.

On December 1, 2015, plaintiffs' counsel deposed Cohen. The following exchange transpired:

> "Q. When you came on the facility in 2009 as the general manager, were you aware of the existence of the wet auger, east/west wet auger?
>
> "A. Well, yes. Because it's the primary transport mechanism for water to the water treatment plant. [¶] . . . [¶]
>
> "Q. Were you aware that that device could kill somebody?
>
> "A. That doesn't make any sense. Everything can kill someone if used improperly. [¶] . . . [¶]
>
> "Q. When you looked at [the east-west wet auger], did you say, wow –
>
> "A. No. As I said, it's like plumbing. It's underground, out of sight, out of mind. It's not something that one considers when one walks through the area. It's underground plumbing. It's a conveyor that's underground moving wastewater. You're not considering it. It's not reasonable that that would be what you would think about when you walk through the area. There's thousands of other things to look at and be concerned with."

On December 23, 2015, plaintiffs' counsel deposed Jacobs. The following exchange transpired:

> "Q. Does Dole design and build plants to process food?
>
> "A. Dole has built plants to process food. The question of design, whether it was done by Dole employees or by outsiders, I don't know. I – strike that. I do know there were outsiders certainly involved in the design of the plants. Whether there were also Dole employees involved, as far as actual knowledge, I don't know."

On December 24, 2015, plaintiffs filed an ex parte motion to continue the hearing on Dole's summary judgment motion. They argued a continuance was necessary to allow them to discover "documents related to the sale of the [Terra Bella] facility" to Setton

Properties, Inc., and to depose Jonathan Rodacy, "the person most knowledgeable about the transa[c]tion." The superior court denied the motion.

On December 28, 2015, plaintiffs filed their opposition to Dole's summary judgment motion and once again asked the court to continue the summary judgment hearing. At the outset, they objected to Gibbons's, Jacobs's, Cohen's, and Fellner's declarations. Plaintiffs alleged Gibbons, Jacobs, Cohen, and Fellner lacked personal knowledge and relayed hearsay; in addition, Gibbons and Cohen improperly testified as expert witnesses.

Plaintiffs asserted Dole (1) designed and sold food processing facility equipment; (2) engaged in real estate development of industrial properties; (3) developed specialized machinery; (4) manufactured, designed, sold, and/or distributed the east-west wet auger and other wet augers as part of its business; (5) built food processing plants; (6) was a secured creditor who could take possession of the east-west wet auger and therefore exercised control over the east-west wet auger and the Terra Bella facility; and (7) either actively concealed or failed to disclose the dangerous condition that killed Santiesteban. Plaintiffs did not dispute several former Dole employees continued to work for Setton Pistachio after the sale of the Terra Bella facility in 1995 and at least one of those employees—Gibbons—knew of the location of the east-west wet auger.

In support of their argument Dole designed and sold food processing equipment, plaintiffs submitted an August 15, 1995 "**DEED OF ASSIGNMENT OF UNITED STATES PATENTS**," under which Dole Dried Fruit and Nut Company transferred to Setton Properties, Inc., its "entire right, title and interest in and to" four particular patents: two for "Apparatus[es] for Splitting Closed Shell Pistachio Nuts" and two for "Method[s] for Splitting Closed Shell Pistachio Nuts." Plaintiffs also submitted an "Intellectual Property Schedule," which described these patents in further detail.

In support of their arguments Dole engaged in real estate development of industrial properties and developed specialized machinery, plaintiffs asked the court to

judicially notice Dole's 1994, 1995, and 2000 annual reports filed with the United States Securities and Exchange Commission (SEC). The 1995 report indicated Dole engaged in "real estate development" as one of its principal businesses until December 28, 1995. Each report—under the heading "Research and Development"—read in pertinent part:

> "Specialized machinery is also developed for various phases of agricultural production and packaging which reduces labor, improves productivity and efficiency and increases product quality. Agricultural research is conducted at field facilities primarily in California, Hawaii, Latin America and Asia."

Plaintiffs provided other documents to establish Dole (1) manufactured, designed, sold, and/or distributed the east-west wet auger and other wet augers, and/or (2) exerted control over the east-west wet auger and the Terra Bella facility. An August 15, 1995 "Leased Property Map for Madera" described property on which landowner S&J[7] agreed to cultivate pistachios and sell said pistachios to Setton Pistachio. Next, an August 15, 1995 security agreement showed Setton Properties, Inc., "has the exclusive possession and control of the [e]quipment" at the Terra Bella facility, including the east-west wet auger; assigned to Dole Dried Fruit and Nut Company a security interest in this equipment; promised to allow Dole Dried Fruit and Nut Company, "[d]uring the period the [c]ollateral is held as security," "to inspect and make abstracts from" "records concerning the [c]ollateral" "at any time during normal business hours"; assented to insure against harm to third parties for bodily injury; and designated Dole Dried Fruit and Nut Company as its agent "to perform all such acts with respect to the [c]ollateral as [Dole Dried Fruit and Nut Company] may in its discretion deem necessary to effectuate the security intended to be granted" in the agreement. The security agreement's "Tangible Personal Property Schedule" recorded a November 1, 1987 "**ACQUISITION [¶] DATE**" for almost 300 pieces of machinery equipment, including a "18inX120ft SECT TRENCH & COVER" matching the description of the east-west wet auger.

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[7] See *ante*, at page 2.

Plaintiffs also asked the court to judicially notice printouts of summaries of inspections performed by the Division of Occupational Safety and Health (Cal/OSHA). One Cal/OSHA inspection summary, numbered 125774521, detailed a September 19, 1996, incident in which a Dole Dried Fruit and Nut employee injured his hand while operating an incline auger at a Fresno site. Another Cal/OSHA inspection summary, numbered 125813444, detailed a July 3, 2006 incident in which a Dole Packaged Foods, LLC, employee's hand was amputated while cleaning an auger at an Atwater site.

In support of their argument Dole built food processing plants, plaintiffs cited the deposition testimony of Jacobs. (See *ante,* at p. 12.) In support of their argument Dole actively concealed or failed to disclose the dangerous condition that killed Santiesteban, plaintiffs cited the deposition testimonies of Gonzales, Gibbons, and Cohen. (See *ante*, at pp. 3-5, 12.)

On January 8, 2016, in a tentative ruling, the superior court overruled plaintiffs' objections to Gibbons's, Jacobs's, Cohen's, and Fellner's declarations, granted plaintiffs' requests for judicial notice "as to the existence of the documents only, and not for the truth of the facts asserted in the documents," and granted Dole's summary judgment motion. That day, shortly after 5:00 p.m., plaintiffs' counsel sent defense counsel an e-mail requesting oral argument. On January 11, 2016, the court concluded plaintiffs' counsel did not timely request oral argument. It stated:

> "I have no proof of timely request for oral argument. I have in my hand here a fax that's dated January 9, which is, of course, not timely, concerning [plaintiffs' counsel's] request for oral argument. I have nothing in writing per fax that was received on Friday January 8. And I believe the clerk even had communication with . . . defendant[] in this action confirming that they had heard nothing about oral argument."

Thereafter, the court adopted its tentative ruling.[8] Judgment was entered on March 15, 2016.

On March 3, 2016, plaintiffs' counsel deposed Rodacy, who was formerly employed by Dole Dried Fruit and Nut Company and Dole Packaged Foods. The following exchange transpired:

> "Q. . . . Were you involved at all in specifying the design of the plant? [¶] . . . [¶] . . . Any plant?
>
> "A. I was not.
>
> "Q. What . . . office would handle that, the design of the plants?
>
> "A. Each plant had their own plant management that would handle those things. [¶] . . . [¶]
>
> "Q. . . . What plants were producing nuts and where were they?

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[8] Courts that choose to issue tentative rulings in civil law and motion matters must follow one of two procedures. (See Cal. Rules of Court, rule 3.1308.) One of the procedures is set forth in California Rules of Court, rule 3.1308(a)(1), which reads in pertinent part:

> "*Notice of intent to appear required* [¶] The court must make its tentative ruling available by telephone and also, at the option of the court, by any other method designated by the court, by no later than 3:00 p.m. the court day before the scheduled hearing. . . . If the court has not directed argument, oral argument must be permitted only if a party notifies all other parties and the court by 4:00 p.m. on the court day before the hearing of the party's intention to appear. A party must notify all other parties by telephone or in person. The court must accept notice by telephone and, at its discretion, may also designate alternative methods by which a party may notify the court of the party's intention to appear. The tentative ruling will become the ruling of the court if the court has not directed oral argument by its tentative ruling and notice of intent to appear has not been given."

The Tulare County Superior Court adopted this procedure. (See Super. Ct. Tulare County, Local Rules, rule 701.) Rule 701 of the court's local rules further provides:

> "Notice to the court of request for oral argument must be made by 4:00 p.m. by facsimile to the following number: fax number 559-733-6774. This number only must be used."

"A. . . . I think the main plants – there were two. There were . . . Orland facility, and the Terra Bella facility. . . . [¶] . . . [¶]

"Q. . . . Was there any specialized equipment for the handling of pineapple that Dole had developed?

"A. There is specialized equipment in the Philippines developed by Dole in 1909, but –

"Q. And what was that? Can you describe that, please.

"A. Ginaca machine. [¶] . . . [¶]

"Q. And what does a Ginaca machine do?

"A. That machine peels, cores, and cuts the end off of pineapple in order to be processed. [¶] . . . [¶]

"Q. What does the plant [in] Orland do?

"A. That was an almond-processing facility.

"Q. And was that sold – was that at one time under your supervision?

"A. Briefly, yes. [¶] . . . [¶]

"Q. . . . What were the plants that you saw [Dole] develop?

"A. There was a facility south of Fresno.

"Q. What town was it associated with?

"A. Yeah, that – okay. Malaga, they called that town, yes. [¶] . . . [¶]

"Q. And what were they doing in Malaga?

"A. Consolidation of dried fruit operations into that facility.

"Q. And what did that involve?

"A. Raisins, prunes, dates were processed and packaged there and distributed to the market.

"Q. And did Castle & Cooke develop that complex?

"A. Yes, they did.

"Q. And they did it from the ground up?

"A. That facility was built from the ground up, right.

"Q. And they installed all of the equipment in it?

"A. Yes.

"Q. And did they have designers that they worked with?

"A. They had a construction company that did all of the design work, yes. [¶] . . . [¶]

"Q. What happened to the Malaga plant? Was that sold?

"A. Equipment was auctioned off, and the plant was eventually sold, yes.

"Q. Was that in your tenure?

"A. It was at the – it actually all happened after I left; but, yeah, the decision was made in early 1997, and it was executed through that year.

"Q. So the equipment itself was – it was sold as auction rather than as a unit, as a plant?

"A. Yeah. No one – they tried to sell it as an ongoing business, as a facility, but no – everybody had – everybody in the business had their facility. So it was more value to bring in an auction and sell it. [¶] . . . [¶]

"Q. Were there any other . . . plant sales that you were involved in?

"A. I think that all happened after I left, to be honest. We teed it all up, and it was all accomplished after I left.

"Q. Which ones did you tee up?

"A. Malaga. Actually had all the other properties of the other plants for sale, but I don't think any of them closed . . . before I left." (Underlining omitted.)

On April 21, 2016, plaintiffs filed a motion for new trial. They alleged the March 15, 2016 judgment was neither supported by law or sufficient evidence and

irregularities in the proceedings prevented them from having a fair trial. Plaintiffs cited the deposition testimony of Rodacy, inter alia. On May 16, 2016, the court denied the motion.

DISCUSSION

I. Judgment entered on order granting summary judgment

a. *Overview of summary judgment law*

Summary judgment "provide[s] courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*); see *Lee v. Marchetti* (1970) 4 Cal.App.3d 97, 99 [" 'The salient philosophy behind this procedural device is to provide a method for the prompt disposition of actions and proceedings which have no merit and in which there is no triable material issue of fact . . . .' " (italics omitted)].) A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining if the papers show that there is no triable issue as to any material fact, the court shall consider all of the evidence set forth in the papers, except the evidence to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence if contradicted by other inferences or evidence that raise a triable issue as to any material fact." (Code Civ. Proc., § 437c, subd. (c).)

A defendant seeking summary judgment bears an initial burden to produce evidence demonstrating either one or more elements of the cause of action cannot be established or there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, 25 Cal.4th at pp. 849-850, 854-855.) If the motion is made against a plaintiff who would bear the burden of proof by a preponderance of

evidence at trial, the defendant "must present evidence that would require a reasonable trier of fact not to find any underlying material fact more likely than not—otherwise, he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact." (*Aguilar*, *supra*, at p. 851, italics & fn. omitted.) If the defendant makes a prima facie showing, then the burden of production "shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(2).) "The plaintiff . . . shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto." (*Ibid.*) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, *supra*, at p. 850, fn. omitted.)

"[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion[9] that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar*, *supra*, 25 Cal.4th at p. 850, fn. omitted.)

b. *Overview of pertinent substantive law*

i. Products liability

1. Strict products liability

"Where a defective or dangerous product causes personal injury, death or property damage to a foreseeable user or consumer, one who is engaged in the business of manufacturing or selling products for use or consumption and who placed the defective

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9 Whereas a burden of production entails only the presentation of evidence, a burden of persuasion entails the establishment of a requisite degree of belief by way of such evidence. (*Aguilar*, *supra*, 25 Cal.4th at p. 850.)

or dangerous product on the market, knowing it was to be used without inspection for defects, will be held strictly liable in tort." (*Pierson v. Sharp Memorial Hospital, Inc.* (1989) 216 Cal.App.3d 340, 343.) "[S]trict liability does not apply to isolated transactions, but rather to sellers 'found to be in the business of manufacturing or retailing.' " (*Ortiz v. HPM Corp.* (1991) 234 Cal.App.3d 178, 187 (*Ortiz*), quoting *Price v. Shell Oil Co.* (1970) 2 Cal.3d 245, 254; see *Hyman v. Gordon* (1973) 35 Cal.App.3d 769, 773-774 (*Hyman*) ["[T]he strict liability doctrine applies to a 'seller . . . engaged in the business of selling such a product' rather than to the occasional seller who is not engaged in that activity as part of his business . . . ."].)

2. Negligence-based products liability

" 'For the cause of action for strict products liability there is no necessity to show duty or breach of duty but only that the product was defective and that the injury to the plaintiff was caused by that defective condition.' [Citation.] In contrast, to prevail on a negligence claim, [the plaintiff] must show that [the defendant] owed her a legal duty, breached the duty, and that the breach was a proximate or legal cause of her injury. [Citation.] In the context of a products liability lawsuit, '[u]nder a negligence theory, a plaintiff must also prove "an additional element, namely, that the defect in the product was due to negligence of the defendant." ' [Citation.]" (*Gonzalez v. Autoliv ASP, Inc.* (2007) 154 Cal.App.4th 780, 793.)

ii. Premises liability

"The elements of a negligence claim and a premises liability claim are the same: a legal duty of care, breach of that duty, and proximate cause resulting in injury." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158.) "[T]he duty to take affirmative action for the protection of individuals coming upon the land is grounded in the possession of the premises and the attendant right to control and manage the premises." (*Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 368.)

A predecessor landowner's liability terminates "upon transfer of control, i.e., the doctrine of caveat emptor is generally followed, except under specified circumstances. [Citation.] One of the exceptions ' "is that the vendor is under a duty to disclose to the vendee any hidden defects which he knows or should know may present an unreasonable risk of harm to persons on the premises, and which he may anticipate that the vendee will not discover." ' [Citation.]" (*Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal.App.4th 334, 349.)

c. *Analysis*

i. Plaintiffs' untimely request for oral argument

Plaintiffs argue the trial court erroneously refused to conduct a hearing on Dole's motion for summary judgment. We disagree.

"[T]rial courts 'retain extensive discretion regarding how [a summary judgment] hearing is to be conducted, including imposing time limits and adopting tentative ruling procedures . . . .' [Citation.] Although a court may not refuse entirely to hear oral argument on a summary judgment motion, a court has substantial discretion to impose reasonable limitations, including to limit the time and subject matter of the argument. Further, a court has broad discretion to determine that a party waived the right to oral argument by failing to timely and properly invoke the procedure." (*Brannon v. Superior Court* (2004) 114 Cal.App.4th 1203, 1211.)

Here, the superior court adopted the tentative ruling procedure set forth in rule 3.1308(a)(1) of the California Rules of Court. Under this procedure, if the court has not directed oral argument by its tentative ruling, oral argument is permitted only if the party notifies the court and all other parties "by telephone or in person" "by 4:00 p.m. on the court day before the hearing of the party's intention to appear." The court also allowed notification by facsimile within the same deadline, which rule 3.1308(a)(1) of the

California Rules of Court allows. If a party does not comply, the tentative ruling becomes the ruling of the court. (See *ante*, fn. 8.)

Here, plaintiffs concede its counsel sent defense counsel an e-mail requesting oral argument shortly after 5:00 p.m. on January 8, 2016. Therefore, the court properly determined plaintiffs did not comply with its local rule and waived their right to oral argument.

ii. Declarations of Gibbons, Jacobs, Cohen, and Fellner in support of summary judgment motion

"Summary judgment law . . . require[s] a defendant moving for summary judgment to present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. . . . [T]he defendant *must* 'support[]' the 'motion' with evidence including 'affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice' must or may 'be taken.' [Citation.] The defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence . . . . But . . . the defendant *must* indeed present evidence . . . ." (*Aguilar, supra*, 25 Cal.4th at pp. 854-855, fns. omitted.) "The same rules of evidence that apply at trial also apply to the declarations submitted in support of and in opposition to motions for summary judgment. Declarations must show the declarant's personal knowledge and competency to testify, state facts and not just conclusions, and not include inadmissible hearsay or opinion." (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 761; accord, Code Civ. Proc., § 437c, subd. (d).)

On appeal, plaintiffs contend Gibbons's, Jacobs's, Cohen's, and Fellner's declarations "each failed to affirmatively establish personal knowledge of the facts attested to" and "contain[ed] inadmissible hearsay" "[t]o the extent . . . declarants were

repeating out-of[-]court statements made to them." Plaintiffs add Gibbons and Cohen improperly gave expert testimony.

In general, "we review the trial court's final rulings on evidentiary objections by applying an abuse of discretion standard." (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 122; see *Alexander v. Scripps Memorial Hospital La Jolla* (2018) 23 Cal.App.5th 206, 226 [weight of authority holds appellate court reviews trial court's rulings on evidentiary objections made in connection with summary judgment motion for abuse of discretion]; *Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1122-1123 (conc. opn. of Turner, P.J.) [same].) "[E]videntiary objections based on lack of foundation . . . are traditionally left to the sound discretion of the trial court." (*Alexander v. Scripps Memorial Hospital La Jolla*, *supra*, at p. 226.) "As the parties challenging the court's decision, it is plaintiffs' burden to establish such abuse, which we will find only if the trial court's order exceeds the bounds of reason." (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 679.)

We find no abuse of discretion. Under penalty of perjury, Gibbons, Jacobs, Cohen, and Fellner—in their respective positions—averred the facts stated in their declarations were true and correct, based on personal knowledge of their companies' operations and/or review of records used in the course of employment. (See *Butte Fire Cases* (2018) 24 Cal.App.5th 1150, 1169; *People ex rel. Owen v. Media One Direct, LLC* (2013) 213 Cal.App.4th 1480, 1484.) "The trial court was entitled to accept these assertions of personal knowledge." (*Butte Fire Cases*, *supra*, at p. 1169, fn. omitted.) Consequently, any claims these individuals improperly relayed hearsay and expert testimony fail.

iii. Summary judgment motion

"[A]s the reviewing court, we determine de novo whether an issue of material fact exists and whether the moving party was entitled to summary judgment as a matter of law. [Citation.] In other words, we must assume the role of the trial court and reassess the merits of the motion. [Citation.] In doing so, we will consider only the facts properly before the trial court at the time it ruled on the motion. [Citation.]" (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1601.) "We apply the same three-step analysis required of the trial court. First, we identify the issues framed by the pleadings since it is these allegations to which the motion must respond. Second, we determine whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in the moving party's favor. When a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable issue of material fact." (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493-494.)

In his declaration, Jacobs attested: (1) Dole produced fruits and vegetables and was not in the business of manufacturing, retailing, or distributing wet augers; (2) Dole acquired the Terra Bella facility, including the east-west wet auger, in 1987; (3) Dole did not manufacture or design the east-west wet auger; (4) in a "one-time" sale, Dole sold the Terra Bella facility, including the east-west wet auger, in 1995; (5) Dole did not own, possess, or otherwise control the Terra Bella facility or the east-west wet auger after the 1995 sale; (6) Dole did not employ anyone at the Terra Bella facility after the 1995 sale; and (7) former Dole employees Gibbons and Gonzales, inter alios, worked for Setton Pistachio after the 1995 sale and were aware of the existence and location of the east-west wet auger. In their declarations, Gibbons, Cohen, and Fellner attested Dole did not own, possess, or otherwise control the Terra Bella facility or the east-west wet auger after the 1995 sale. Moreover, Gibbons corroborated he and Gonzales, inter alios, worked for Dole prior to the sale, worked for Setton Pistachio after the sale, and were aware of the

existence and location of the east-west wet auger. Hence, Dole satisfied its initial burden of production and established a prima facie case that it (1) neither manufactured or designed the east-west wet auger or other wet augers; (2) was—at most—an occasional seller of wet augers; and (3) neither owned, possessed, nor otherwise controlled the Terra Bella facility or the east-west wet auger after the 1995 sale. We must now decide whether plaintiffs produced evidence demonstrating the existence of a triable issue of material fact. We conclude they did not.

1. No triable issue as to whether Dole manufactured and/or designed the east-west wet auger or was engaged in the business of manufacturing, designing, and/or selling wet augers

Plaintiffs relied on the August 15, 1995 security agreement (see *ante*, at p. 14) to establish Dole manufactured and/or designed the east-west wet auger. They specifically pointed to the attached "Tangible Personal Property Schedule," which showed Dole acquired the east-west wet auger on November 1, 1987. The same schedule listed almost 300 pieces of machinery equipment that were acquired on the same date. In addition, the record contains the September 29, 1987 purchase agreement between Dole's predecessor and Apache Corporation, which specified a closing date of no later than December 15, 1987. It cannot be reasonably deduced from these documents Dole manufactured and/or designed the east-west wet auger as well as hundreds of other pieces of machinery equipment before it took ownership of the Terra Bella facility.

There is no dispute Dole sold the east-west wet auger to Setton Properties, Inc., in 1995. As noted, strict liability does not apply to a seller unless the seller is engaged in the business of selling the purportedly defective product. (See *Ortiz*, *supra*, 234 Cal.App.3d at p. 187; *Hyman*, *supra*, 35 Cal.App.3d at pp. 773-774.) Plaintiffs provided evidence Dole built food processing plants, consulted with "outsiders" with regard to plant design, and patented apparatuses and methods for splitting closed shell pistachio nuts. They submitted a map of property in Madera that was owned by Dole and where

pistachios were grown. Plaintiffs asked the superior court to judicially notice various documents, namely (1) annual reports filed by Dole with the SEC indicating (a) Dole engaged in real estate development until December 28, 1995; and (b) Dole developed specialized machinery "for various phases of agricultural production and packaging which reduces labor, improves productivity and efficiency and increases product quality," and (2) two Cal/OSHA inspection summaries showing (a) an auger-related injury sustained by a Dole Dried Fruit and Nut employee at a Fresno site in 1996, and (b) an auger-related injury sustained by a Dole Packaged Foods, LLC, employee at an Atwater site in 2006. None of these, however, demonstrated Dole was engaged in the business of manufacturing, designing, and/or selling wet augers.[10]

Since there is no triable issue as to whether Dole manufactured and/or designed the east-west wet auger or was engaged in the business of manufacturing, designing, and/or selling wet augers, plaintiffs cannot prevail on their causes of action for strict products liability (see *Ortiz*, *supra*, 234 Cal.App.3d at p. 187; *Hyman*, *supra*, 35 Cal.App.3d at pp. 773-774) or negligence-based products liability (see *Gonzalez v. Autoliv ASP, Inc.*, *supra*, 154 Cal.App.4th at p. 793 [negligence theory of products liability subsumes elements for strict products liability]).

2. No triable issue as to whether Dole owned, possessed, or otherwise controlled the Terra Bella facility

There is no dispute Dole sold the Terra Bella facility in 1995. Plaintiffs nonetheless contend Dole had the right to control the premises because it was a secured creditor. In their opposition, they highlighted certain provisions in the August 15, 1995 security agreement, namely Setton Properties, Inc.'s assent to insure against harm to third parties for bodily injury and its designation of Dole Dried Fruit and Nut Company as its

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10 Assuming, arguendo, the superior court should have judicially noticed the annual reports filed with the SEC and the Cal/OSHA inspection summaries for the truth of the matters asserted and not merely for their existence, any error was harmless.

agent "to perform all such acts with respect to the [c]ollateral as [Dole Dried Fruit and Nut Company] may in its discretion deem necessary to effectuate the security intended to be granted" in the agreement. Plaintiffs do not cite case authority to support the notion a security interest rises to the level of control necessary to support a cause of action for premises liability. (See *ante*, fn. 6.) Furthermore, in the aforementioned security agreement, Setton Properties, Inc., (1) "represents and warrants unto" Dole Dried Fruit and Nut Company that Setton Properties, Inc., "*has the exclusive possession and control of the [e]quipment*" (italics added), including the east-west wet auger, and (2) "[d]uring the period the [c]ollateral is held as security," only "warrants and covenants that it shall" "maintain its place of business and chief executive office and the offices where it keeps its records concerning the [c]ollateral," "hold and preserve such records," and "permit [Dole Fruit and Nut Company] at any time during normal business hours to inspect and make abstracts from such records." Plaintiffs offer no evidence Setton Properties, Inc., was in default and Dole regained possession of the collateral at the time of the accident.

Alternatively, plaintiffs contend Dole actively concealed or failed to disclose the east-west wet auger. In their opposition, they cited the deposition testimonies of Gonzales, Gibbons, and Cohen. However, these testimonies merely demonstrated the subterranean placement of the east-west wet auger obscured warning labels. Gonzales, Gibbons, and Cohen, all of whom were employed by Setton Pistachio at the time of the accident, were aware of the existence and location of the east-west wet auger. Moreover, (1) Gonzales and Gibbons were former Dole employees who continued to work at the Terra Bella facility for Setton Pistachio after the 1995 sale, and (2) in the August 15, 1995 security agreement, Setton Properties, Inc., assigned a security interest in the east-west wet auger. It cannot be reasonably deduced from these facts Dole could anticipate

Setton Pistachio would not have discovered the east-west wet auger in its possession in the 15 years preceding the accident.[11, 12]

3. Plaintiffs' claim of successor liability

"[A] party which acquires a manufacturing business and continues the output of its line of products . . . assumes strict tort liability for defects in units of the same product line previously manufactured and distributed by the entity from which the business was acquired." (*Ray v. Alad Corp.* (1977) 19 Cal.3d 22, 34.) "By taking over and continuing the established business of producing and distributing [products], [the purchasing entity] bec[o]me[s] 'an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products' [citation]." (*Ibid.*)

Plaintiffs assert on appeal Dole is liable as a successor to Apache Corporation and/or T.M. Duche Nut Co., Inc. We reject the claim: plaintiffs offer no evidence either Apache Corporation or T.M. Duche Nut Co., Inc., manufactured, designed, or were engaged in the business of selling wet augers.

4. Plaintiffs' claim regarding burden-of-proof allocation

Citing *Morris v. Williams* (1967) 67 Cal.2d 733, 760, plaintiffs argue the burden of proof regarding whether Dole manufactured or designed the east-west wet auger belonged to Dole because such evidence was "peculiarly within" Dole's knowledge. " 'In determining whether the normal allocation of the burden of proof should be altered,

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11 On appeal, plaintiffs complain the superior court should have considered the declaration of their expert witness Jay Preston, a registered professional safety engineer. We reviewed Preston's declaration and found the content immaterial to the instant appeal. Consequently, any claims related to Preston fail.

We address Preston's declaration in further detail in *Ochoa v. Setton Pistachio of Terra Bella, Inc., supra*, F073978. (See *ante*, fn. 4.)

12 On appeal, plaintiffs complain the superior court improperly considered "[Dole's] additional evidence in support of the reply brief for its[] summary judgment." We conducted a de novo review and reached our holding without taking this challenged evidence into account.

the courts consider a number of factors[, including] . . . the availability of the evidence to the parties . . . .' [Citation.]" (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 660-661.) Here, as demonstrated by plaintiffs' opposition, evidence was available, obtained, and presented. There was no need to alter the normal allocation of the burden of proof.

iv. Plaintiffs' claim of discovery error

Plaintiffs assert on appeal the superior court improperly denied multiple requests to continue the summary judgment hearing.[13] They assert the denial was prejudicial in view of the deposition testimony of Rodacy, which was taken 12 days before entry of judgment.

"Management of discovery generally lies within the sound discretion of the trial court." (*Lipton v. Superior Court* (1996) 48 Cal.App.4th 1599, 1612.) Furthermore, "when a plaintiff appeals from a judgment to obtain review of a trial court's discovery orders, the plaintiff 'must "show not only that the trial court erred, but also that the error was prejudicial"; i.e., the plaintiff must show that it is reasonably probable the ultimate outcome would have been more favorable to the plaintiff had the trial court not erred in the discovery rulings. [Citation.]' [Citation.] An appellant must 'show that the error was prejudicial [citation] and resulted in a "miscarriage of justice" [citation].' [Citation.]" (*Property Reserve, Inc. v. Superior Court* (2016) 6 Cal.App.5th 1007, 1020.)

Assuming, arguendo, the court erred, we cannot conclude there was a reasonable probability Dole's summary judgment motion would have been defeated. Dole made the requisite prima facie showing through admissible declarations and shifted the burden to plaintiffs to demonstrate triable issues of material fact. At his deposition, Rodacy testified Dole built a facility in Malaga "from the ground up"; Dole subsequently

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13 Plaintiffs also allege counsel for Setton Pistachio and Terra Bella Agland hindered discovery. This argument is addressed in *Ochoa v. Setton Pistachio of Terra Bella, Inc.*, *supra*, F073978. (See *ante*, fn. 4.)

auctioned off the equipment at the Malaga facility and sold the property; Dole had put other plants up for sale; Dole's plant managers at individual plants handled design plans; and Dole developed a specialized "Ginaca machine" to peel, core, and cut pineapples. This testimony did not indicate Dole manufactured or designed the east-west wet auger; was engaged in the business of manufacturing, designing, and/or selling wet augers; or owned, possessed, or otherwise controlled the Terra Bella facility at the time of the accident.

II. Order denying new trial motion

Finally, plaintiffs contend the court should have granted their motion for new trial. They rehash their myriad of arguments the March 15, 2016 judgment was legally, factually, and procedurally deficient and offer Rodacy's deposition testimony as newly discovered evidence. As we discussed, Dole made the requisite prima facie showing through admissible declarations and shifted the burden to plaintiffs to demonstrate triable issues of material fact. Plaintiffs could not make this showing. Rodacy's deposition testimony would have been inconsequential. Lastly, any purported errors were harmless. (See *Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 1161 [" '[T]here is no discretion to grant a new trial for harmless error.' "].)

DISPOSITION

The judgment and order of the superior court is affirmed. Costs are awarded to defendant Dole Food Company.

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DETJEN, Acting P.J.

WE CONCUR:

_____
MEEHAN, J.

_____
DESANTOS, J.